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博 士 学 位 论 文

信用评级利益冲突規制研究
——以美国为中心的研究与借鉴

A Research of the Regulation on Conflicts of Interest Relating to Credit Ratings
——The Study and Reference Focusing on America

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内容摘要

论文以信用评级过程中存在的利益冲突为研究对象，以美国为研究中心，从市场自律、司法规制和行政监管三个方面分析了信用评级利益冲突的规制方式和规制内容，并提出建立、健全我国信用评级利益冲突规制制度的建议。

第一章是论文的基本理论部分，首先分析信用评级利益冲突的含义、冲突的内容和冲突的来源以及利益冲突所造成的不利影响，说明对信用评级利益冲突进行规制的重要意义，接着讨论了信用评级利益冲突的规制结构，说明信用评级利益冲突的规制方式主要有市场自律、司法规制和行政监管三种方式。

第二章讨论了信用评级利益冲突市场自律规制的内容。声誉机制是信用评级机构采取自我规制措施的约束力量，促使信用评级机构建立中国墙制度、评级操作规程和内部行为规范等自律措施，市场自律在信用评级业发展的初期发挥了重要作用，但是由于 20 世纪后期评级业垄断状态的形成、信用评级监管许可权力的膨胀和声誉机制本身缺陷等原因，市场自律机制显露出局限性。

第三章讨论了信用评级利益冲突司法规制的内容。在美国，因利益冲突引发的不实评级诉讼有诽谤之诉、欺诈之诉和过失虚假陈述之诉，法院通过对信用评级机构责任的认定，对信用评级机构的行为产生导向作用，从而规制信用评级利益冲突。第一节分析诽谤行为的司法规制，由于美国诽谤法律宪法化的原因，信用评级机构未经聘请主动发布评级的行为受到宪法的保护，司法规制的作用有限；第二节分析欺诈行为的司法规制，通过对侵权法、证券法的反欺诈规定和相关判例的分析，阐明司法对信用评级机构欺诈行为的规制作用；第三节分析过失行为的司法规制。对于一般过失虚假陈述行为，法院出于对司法管理政策和行业利益等因素的考量，认为信用评级机构只应在有限范围内承担第三人侵权责任，对于证券过失虚假陈述行为，只有信用评级机构同意将评级列入发行文件时才承担过失虚假陈述责任，因此司法裁判方式对信用评级机构过失行为发挥有限规制作用。就美国法律现状而言，信用评级利益冲突的司法规制主要是民事责任的内容，笔者也没有检索到信用评级机构承担刑事责任的判例，因此本文对于信用评级机构司法规制内容的探讨限于信用评级机构民事责任角度的分析。

第四章分析了信用评级利益冲突行政监管的内容。第一节是行政监管制度的

概述部分，阐述了行政监管方式在信用评级利益冲突规制结构中的核心地位，行政监管的基本制度有内部控制监管、信息披露监管和禁止性规定等内容。第二节讨论了评级机构层面结构性利益冲突行政监管的具体措施。第三节讨论了评级机构层面业务性利益冲突行政监管的具体措施。第四节讨论了信用评级机构人员层面利益冲突行政监管的具体措施。针对利益冲突本身采取的监管措施存在局限性，因此第五节提出了信用评级质量监控制度，通过对评级质量的监控，对信用评级利益冲突产生规制作用。

第五章对完善我国信用评级利益冲突的规制制度提出建议。第一节分析了我国信用评级行业自律现状，提出促进自律机制发挥作用的建议；第二节对我国信用评级利益冲突司法规制的内容进行分析，并提出完善建议。第三节提出了我国建立、健全信用评级利益冲突行政监管制度的具体建议，包括确定行政监管主体、加强内部控制制度、强化信息披露制度、建立评级质量监控制度等内容。

关键词：信用评级；利益冲突；市场自律；司法规制；行政监管

Abstract

The dissertation discusses as a research object the conflicts of interest relating to credit ratings and centres upon a U.S. law perspective. The paper provides an analysis of various regulations, including the market discipline, the judicial regulation and the administrative regulation. Based on the above the paper sets out suggestions for establishment and perfection of regulation systems on the conflicts of interest regarding credit ratings in China.

In Chapter One the author presents an overview of the basic theories. This chapter first analyses the definition, contents and the sources of conflicts of interest relating to credit ratings, the possible adverse effects resulting from conflicts of interest and the important implications of regulation on the conflicts of interest. Then this chapter explores that various methods of regulation on conflicts of interest including the market discipline, the judicial regulation and the administrative regulation.

In Chapter Two the author discusses the market discipline on the conflicts of interest relating to credit ratings. The reputation mechanisms are the force of self-regulation of credit rating agencies. Under the reputation mechanisms, credit rating agencies adopt the greatwall, rating procedures and the internal code of conducts to control the conflict of interest. Reputation mechanisms played the important role in the early stage of the development of credit rating industry. In the late twentieth century, with the emergence of monopoly in credit rating industry, expansion of power of regulatory license and the deficiency in the reputation mechanisms, the limitation of the market discipline has already been exposed, and the regulation targeting the reputation mechanisms is ineffective.

In Chapter Three the author discusses the judicial regulation on the conflicts of interest relating to credit ratings. The conflicts give rise to inaccurate ratings, and the plaintiff would accuse credit rating agencies of libel, fraud or negligent representation. Subchapter One analyses the judicial regulation on libel and draws the conclusion that the credit rating agencies' issuance of negative unsolicited ratings were entitled to First Amendment protection and the libel litigation may not function as deterrence to dishonest unsolicited ratings. Subchapter Two analysis the judicial regulation on fraud and draws the conclusion that the judicial regulation may function as deterrence to

fraud in ratings under the common law and securities law. Subchapter three analyses the judicial regulation on the negligent representation. Due to the consideration of interest of the industry and judicial administration, rating agencies owe the negligent liability to limited scope of public investor under the common law. Credit rating agencies will assume the negligent representation liability of inaccurate ratings under the securities law if they were willing to consent to inclusion of their ratings in registration statements or prospectuses. So the judicial regulation performs a limited function as deterrence to dishonest ratings under the common law and securities law. There has been no relevant criminal cases reported in U.S. up to now, therefore the paper focuses on the civil liability relating to credit rating agencies.

In Chapter Four the author discusses the administrative regulation on the conflict of interest relating to credit rating. Subchapter One analysis the basic system of the administrative regulation and explains that the administrative is at the core status in the structure of regulation on conflicts of interest and the paths of the administrative regulation include the regulation on internal control system, the regulation on information disclosure system and the prohibition of activities creating conflicts. Subchapter Two discusses the regulation targeting structural conflicts of interest at the rating agency level. Subchapter Three discusses the regulation targeting activity-based conflict of interest at the rating agency level. Subchapter Four discusses the regulations targeting conflicts of interest at the analyst level. Subchapter Five proposes the perfection measures of rating quality regulation after discussing the deficiency of the current administrative regulation.

In Chapter Five the author discusses the current regulation on conflicts of interest relating to credit ratings in China and its perfection. Subchapter One analysis the status quo of market discipline on conflicts of interest relating to credit ratings in China and proposes its perfection. Subchapter Two discusses the judicial regulation on the conflicts of interest in China and proposes its perfection. Subchapter Three puts forward the proposed rules to control the conflicts of interest including establishing internal control system, information disclosure system and rating quality regulation. In addition, the paper proposes that the government shall designate a supervisory body and develop the competitive credit rating industry.

Key Words: Credit Ratings; Conflicts of Interest; Market Discipline;
Judicial Regulation; Administrative Regulation

Abbreviations

缩略语	全称
CDO	Collateralized Debt Obligation
COSO	Committee of Sponsoring Organization of the Treadway Commission
Fitch	Fitch, Inc.
HHI	Herfindahl Hirschman Index
IOSCO	International Organization of Securities Commissions
Moody's	Moody's Investors Service, Inc.
NRSRO	Nationally Recognized Statistical Rating Organization
RMBS	Residential Mortgage-backed Securities
SEC	U.S. Securities and Exchange Commission
S & P	Standard & Poor's Ratings Services

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